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IN THE

Supreme Court of the United States

APRIL TERM 1973

No.

HAROLD R. PLUMMER,

Appellant

v.

CITY OF COLUMBUS, OHIO,

Appellee

On Appeal from the Supreme Court of Ohio

MOTION TO DISMISS

OPINIONS BELOW

None of the opinions below are reported in an official reporter at this time. All of the opinions below are included within the Appendix of Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in Appellant's Jurisdictional Statement.

QUESTION PRESENTED

The sole question presented is the constitutionality of Section 2327.03 of the General Offense Code of the City of Columbus, Ohio.

STATEMENT OF THE CASE

Appellant was arrested on February 10, 1972, in Columbus, Ohio, on a charge of improper language under Section 2327.03 of the Columbus City Code. The case came before the Honorable Bruce Jenkins, Judge of the Franklin County Municipal Court, on the 5th day of May, 1972. Appellant was found guilty of violations of the City Ordinance by the Court.

Appellant's conviction was affirmed by the Court of Appeals of Franklin County, Ohio and the subsequent appeal to the Supreme Court of Ohio was dismissed for the reason that no substantial constitutional question exists.

ARGUMENT

There Is No Substantial Federal Question Presented

In considering a New Hampshire statute similar to the ordinance in the present case, the Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), upheld a conviction because of the narrow construction the New Hampshire Court placed on the statute limiting prosecution under it to a very narrowly defined class of speech, to-wit "fighting words". The *Chaplinsky* fighting words doctrine has been recently reaffirmed by the Court in numerous decisions, including *Gooding, Warden v. Wilson*, 405 U.S. 518 (1972), *Brown v. Oklahoma*, 408 U.S. 914 (1972), *Lewis v. City of New Orleans*, 408 U.S. 913 (1972).

In the instant case, the Franklin County Court of Appeals limited the application of the statute in question by specifically finding that the words uttered by Appel-

lant were those envisioned by the Court in *Chaplinsky*, supra, and its progeny. In its opinion, the Court of Appeals stated:

> "We conclude further that the words as used by the defendant-appellant herein are in the nature of "fighting words" and thereby fall within that limit of conduct proscribed by the ordinance, following *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, and *Gooding v. Wilson* (1972), 92 S. Ct. 1103."

While Section 2327.03 of the Columbus City Code was ir.volved in the recent decision of this Court in *Cason v. City of Columbus*, 409 U.S. 053 (Dec. 11, 1972) wherein the Court reversed a conviction for using improper language citing *Gooding, Warden v. Wilson*, 405 U.S. 518 (1972), the Court made no specific declaration concerning the constitutionality of this ordinance. Subsequent to that decision, the Ohio Supreme Court dismissed the appeal in the present case. The City's brief submitted to the Ohio Supreme Court requesting the dismissal noted the limited application given the statute by the Court of Appeals which distinguishes the present case from *Cason*, supra.

Further, in light of *Cason*, supra, being remanded to the Ohio Supreme Court for further proceedings, it is presumed that the state is to be permitted to settle its own law to accord with the recent decisions of this Court requiring the narrow and limited construction and application to be given the statute in question in all cases.

CONCLUSION

By reason of the narrow application of Section 2327.03 of the Columbus City Code by the Ohio Courts in the instant case to satisfy the requirements of *Chaplinsky v. New Hampshire*, supra, and its progeny, Appellee respectfully submits that this appeal be dismissed as not presenting any substantial federal question.

Respectfully submitted,
JAMES J. HUGHES, JR.
DANIEL W. JOHNSON
WALTER C. BOYUK
Attorneys for Appellee

CERTIFICATE OF SERVICE

We hereby certify that on this 6th day of July, 1973, three copies of the foregoing Motion to Dismiss on Appeal from the Supreme Court of Ohio were mailed, postage prepaid to Mr. Roger C. Stridsberg, Counsel for Appellant, at 8 East Broad Street, 11th Floor, Columbus, Ohio 43215. We further certify that all parties required to be served have been served.

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PLUMMER *v.* CITY OF COLUMBUS

ON APPEAL FROM THE COURT OF APPEALS OF OHIO FOR FRANKLIN COUNTY

No. 72-6897. Decided October 15, 1973

The Ohio Supreme Court erred in finding no constitutional infirmity in the lower court's holding that a city ordinance punishing abuse of another by using menacing, insulting, slanderous, or profane language might constitutionally reach appellant's use of "fighting words," where the ordinance, as construed by the Ohio courts, is facially unconstitutional because it may be applied not only to punish unprotected but also protected speech. Even though a law may be valid as applied to the conduct charged against a particular defendant, he may raise its vagueness or unconstitutional overbreadth as applied to others, and, if the law is found deficient in one of these respects, it may not be applied to him either, absent a satisfactory limiting construction.

Reversed.

PER CURIAM.

The Court of Appeals of Franklin County, Ohio, in an unreported opinion, affirmed appellant's conviction of violating Columbus City Code § 2327.03, which provides: "No person shall abuse another by using menacing, insulting, slanderous, or profane language." The Ohio Supreme Court, in an unreported order, *sua sponte* dismissed appellant's appeal to that court "for the reason that no substantial constitutional question exists herein." We grant leave to proceed *in forma pauperis* and reverse.

On December 11, 1972, we held that *Gooding* v. *Wilson*, 405 U. S. 518 (1972), required the reversal of a previous action of the Ohio Supreme Court that dismissed an appeal from a conviction under § 2327.03. *Cason* v. *City of Columbus*, 409 U. S. 1053. Section 2327.03 punishes only spoken words and, as construed by the Ohio courts, is facially unconstitutional because not lim-

ited in application "to punish only unprotected speech" but is "susceptible of application to protected expression." *Gooding* v. *Wilson, supra,* at 522. In that circumstance, the Ohio Supreme Court erred when it found no constitutional infirmity in the holding of the Court of Appeals of Franklin County that the ordinance might constitutionally reach appellant's conduct because "the words as used by the [appellant] are in the nature of 'fighting words' and thereby fall within that limit of conduct proscribed by the ordinance . . . ." For "'[a]lthough [the ordinance] may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the [ordinance]. The [ordinance], in effect, is stricken down on its face. . . .'" *Id.,* at 521.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN dissent for the reasons expressed in MR. JUSTICE BLACKMUN's dissenting opinion in *Gooding* v. *Wilson,* 405 U. S. 518, 534 (1972), and in the dissenting statement in *Cason* v. *City of Columbus,* 409 U. S. 1053 (1972).

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

Appellant is a Columbus cab driver. He had a female fare in his cab who had requested to be taken to a certain address. When he passed this address, the fare complained and—according to the statement of the trial court—the cab driver's response was "a series of abso-

lutely vulgar, suggestive and abhorrent, sexually-oriented statements."

I would sustain appellant's conviction for the reasons stated in my dissenting opinion in *Rosenfeld* v. *New Jersey*, 408 U. S. 901, 906 (1972). As stated therein:

> "[A] verbal assault on an unwilling audience [or an individual] may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance."

The Columbus city code was certainly sufficiently explicit to inform appellant that his verbal assault on a female passenger in his cab was "menacing and insulting." As a wrong of this character does not fall within the protection of the First Amendment, the overbreadth doctrine is not applicable. See Model Penal Code, §§ 250.2 (1)(a) and (b) (Proposed Official Draft 1962); see also *Williams* v. *District of Columbia*, 136 U. S. App. D. C. 56, 64, 419 F. 2d 638, 646 (1969).